STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BARNES, Minors.

UNPUBLISHED
July 22, 2014

Nos. 320020, 320022
Lapeer Circuit Court
Family Division
LC No. 12-011679-NA

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Respondent parents appeal as of right the trial court's termination of their parental rights to the minor children, GB, TB, and LB (collectively referred to as "the children").[1] We affirm the trial court's order with respect to the minor children TB and LB. With respect to the minor child GB, we affirm the portion of the trial court's order determining that statutory grounds for termination existed, but vacate the trial court's best-interest analysis and remand for further consideration of that issue.

I. STATUTORY GROUNDS

Respondents first argue that the trial court clearly erred in finding that petitioner proved by clear and convincing evidence that grounds for termination of respondents' parental rights existed under MCL 712A.19b(3)(b)(*ii*), (c)(*i*), (g), and (j). We disagree.

This Court reviews for clear error a trial court's decision that a ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "A trial court's decision is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Olive/Metts Minors*, 297 Mich

[1] This case involves the consolidation of two appeals from the same lower court file. In docket No. 320020, respondent father appeals as of right the termination of his parental rights, and in docket No. 320022, respondent mother appeals as of right the same order terminating her parental rights. This Court consolidated the appeals "to advance the efficient administration of the appellate process." *In re Barnes Minors*, unpublished order of the Court of Appeals, entered January 29, 2014 (Docket Nos. 320020, 320022).

App 35, 41; 823 NW2d 144 (2012) (internal quotation marks and citation omitted). "Clear error signifies a decision that strikes [this Court] as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). "Due regard is given to the trial court's special opportunity to judge the credibility of witnesses." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). See also MCR 2.613(C).

"Termination of parental rights is appropriate when the [Department of Human Services (DHS)] proves one or more grounds for termination by clear and convincing evidence. It is only necessary for the DHS to establish by clear and convincing evidence the existence of one statutory ground to support the order for termination of parental rights." *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012) (citations omitted). "If a statutory ground for termination is established and the trial court finds 'that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.' " *In re Ellis*, 294 Mich App 30, 32-33; 817 NW2d 111 (2011), quoting MCL 712A.19b(5).

The first ground for termination at issue here is MCL 712A.19b(3)(b)(*ii*), which provides for termination where:

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> * * *
>
> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

Respondents do not contest that the children suffered sexual abuse or that respondents failed to prevent it. Respondents pleaded no contest to the amended original petition describing the abuse and alleging that respondents failed to adequately supervise the children, which led to sexual conduct and incest between the children. Instead, respondents challenge the finding that there is a reasonable likelihood that the children will suffer injury or abuse in the foreseeable future if returned to respondents' care.

We conclude that the evidence supported the trial court's finding of a reasonable likelihood that the children will suffer injury or abuse in the foreseeable future if placed back in respondents' home. John Neumann, the sexual risk assessment expert, opined that, although respondents were at a low risk of being predators themselves, there was a very significant, high risk of recidivism related to the continued sexualized environment in the home and respondents' neglect of the children that led to the sexual acts between them. Although respondents had engaged in therapy, Neumann did not believe they had internalized the required parenting skills or understood the problems that occurred with the children. Given the history of this case, in which respondents had previously performed well under direct supervision but then always regressed after safeguards were removed, Neumann did not think that counseling would be successful for respondents.

Neumann's opinion was supported by the testimony of DHS service providers who assisted respondents over the course of several years, dating back to when the sexual abuse began in 2008. This testimony established that respondents had difficulty following through after the services ended because respondents always failed to internalize the parenting skills that were taught. Heather McEntire, who had 30 years' experience of providing parenting aide services for DHS, testified that the children need constant supervision given the history of sexual abuse between them. Yet when a worker was not in the home, respondents failed to follow through with supervision. In McEntire's view, it would be unsafe to return the children to respondents given this history. McEntire was also concerned that respondents refused to take the blame for the inappropriate supervision, instead blaming the police and Child Protective Services (CPS) for not removing the children's older sibling, AB, from respondents' care. McEntire did not believe respondents would understand the seriousness of continuing adequate supervision after a few months. When told that the children had expressed fears about returning to respondents' care, respondent mother said that she had rights too, instead of thinking about what was best for the mental and physical health of her children.

Christina Nelson, a contractual parent aide for DHS, worked with respondents' family in 2008 when there were sexual issues in the family. Respondent mother knew in 2008 that there was inappropriate sexual behavior among the children. The behavior started when AB was molested by his two older cousins; then AB engaged in sexual acts with TB and GB, and according to respondent mother, the behavior continued occasionally between all the children. Nelson discussed with respondents safety features, including keeping the children supervised to avoid further sexual incidents.

Deanna Cottle, the foster care worker on this case since the children were removed from respondents' care in 2012, testified that numerous services have been provided to respondents to address improper supervision, environmental neglect, and budgetary problems, for most of the period from 2007 to the present. Respondent mother knew that AB was sexually inappropriate with a cousin on July 23, 2012; yet four days later, respondent mother was sleeping when AB abused TB, after years of being informed of what she needed to do to supervise the children. Also, Cottle indicated that respondent father's therapist, Anita Jolly, indicated in her most recent report that respondent father was only *beginning* to understand some of his responsibilities as a father, such as providing emotional support and keeping the children safe. Cottle testified that in seven years of services provided to respondents, the importance of supervision was stressed again and again, and yet the children were ultimately removed as the appropriate supervision steps were not followed. Cottle believed respondent mother has not benefitted from services, given that after previous concerns about numerous people living in the home and respondent mother then going through therapy, she called Cottle in November 2013 to ask about having a family with an open CPS case move into her home. Respondents' lack of judgment caused continued concern about the children's safety. The removal of AB from the home did not alleviate Cottle's concern, given that sexual abuse also occurred between GB and TB, and there was sexual abuse of LB. There was also sexual abuse involving the children's cousins. Cottle agreed with Neumann's assessment that there is a high risk of recidivism by respondents for neglect and abuse if the children are returned home. Based on the history of the case, the number of referrals, respondents' conduct, and the assessments regarding respondents' ability to parent the children, Cottle believed there is a reasonable likelihood that the children would be harmed if returned to respondents' home.

In addition, respondents' own testimony indicated that they have not benefited from the years of services provided to them. Respondent father acknowledged that, before the 2012 sexual abuse occurred, he allowed AB to have a pornographic magazine because respondent father did not see anything wrong with it. Respondent mother acknowledged that during the July 27, 2012 incident, AB, GB, and TB were in a room and viewed the pornographic magazine to give them some ideas of what to do. Respondent mother admitted that giving the magazine to AB was a terrible idea of respondent father's. Respondent father acknowledged that after all the services that were provided to the family from 2008 to 2012, there were major mistakes that resulted in sexual molestation among his children. Respondent mother conceded that sexual abuse continued among the children after the May 2008 incident that was reported, including a sexual incident between GB and TB in 2009. Respondent mother also admitted contacting Cottle a couple months before the termination hearing to ask about having additional people move into her home.

In light of the above testimony, we conclude that the trial court did not clearly err in finding clear and convincing evidence of a reasonable likelihood that the children will suffer abuse in the foreseeable future if returned to respondents' home. Respondents consistently failed to benefit from numerous services provided to them over several years and continued to display a lack of judgment and a lack of benefit from services at the time of the termination hearing. Although respondents contend that they have a new alarm and video system in their home, this does not alter the fact that they have an extended history of appearing to comply with what they are taught when services are in place but then failing to follow through when services end. Respondents' reliance on the fact that AB is no longer in the home ignores the fact that abuse occurred among the other children as well. The children have suffered extensive emotional harm from sexual abuse that occurred over a period of several years, including abuse that occurred after services were already provided to respondents. There is no indication that respondents have internalized the ability to provide adequate supervision to prevent further abuse if the children are returned to respondents' care. Accordingly, the trial court did not clearly err in finding that clear and convincing evidence supported termination under MCL 712A.19b(3)(b)(*ii*).

Because at least one ground for termination existed, we need not consider the additional grounds on which the trial court based its decision. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). We will nonetheless briefly address the additional grounds.

The next ground for termination at issue here is MCL 712A.19b(3)(c)(*i*), which provides for termination where:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

It is undisputed that respondent father and respondent mother were respondents in a proceeding under this chapter, and that more than 182 days have elapsed since the issuance of an initial dispositional order.

Further, the conditions that led to the adjudication continue to exist. Respondents pleaded no contest to an amended petition alleging that they failed to adequately supervise the children, which led to delinquency and sexual conduct between the children. As discussed, there was evidence at the termination hearing that respondents failed to benefit from services so that they could adequately supervise their children to prevent further sexual abuse between the children. The trial court did not clearly err in finding clear and convincing evidence to support termination under MCL 712A.19b(3)(c)(*i*).

The next ground for termination in this case is MCL 712A.19b(3)(g), which requires a court to find by clear and convincing evidence that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." "A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). See also *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003); *In re Trejo Minors*, 462 Mich at 360-361 n 16. Again, although respondents participated in their case service plan by attending therapy and in other respects, there was evidence at the termination hearing that they failed to benefit from services. In particular, respondents did not internalize the requisite parenting skills needed to adequately supervise the children and prevent further sexual abuse between them. The children have suffered extensive emotional harm from the sexual abuse, and there is no indication that respondents have acquired the skills required to address the children's needs. In addition, respondents failed to adequately address their financial difficulties, remaining behind in their property taxes after several years of owing back taxes and receiving services on how to follow a budget. The trial court did not clearly err in finding clear and convincing evidence to support termination on this ground.

The final ground for termination is MCL 712A.19b(3)(j), which requires a court to find by clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." Harm includes both physical harm and emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). "[A] parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home." *In re White*, 303 Mich App at 711. Respondents' failure to benefit from the case service plan to acquire the parenting skills needed to prevent further sexual abuse between the children supports a conclusion that the children will be harmed if returned to respondents' home. Respondents failed to internalize how to supervise the children despite the numerous services provided to respondents. This is troubling given the extensive emotional harm the children have already suffered as a result of the sexual abuse that respondents failed to prevent. Also, in 2009, LB was found face-down in a pond and not breathing, and respondents did not follow through with medical attention. Respondents' failure to adequately improve their parenting skills makes it reasonably likely the children will be harmed if returned to respondents' care. The trial court did not clearly err in finding that clear and convincing evidence supported termination under this ground.

II. BEST INTERESTS

Respondents next argue that the trial court clearly erred in finding that termination of respondents' parental rights was in the children's best interests. This Court reviews the trial court's best interest determination for clear error. *In re Olive/Metts Minors*, 297 Mich App at 40. Whether termination is in a child's best interests is determined by a preponderance of the evidence standard, rather than the clear and convincing evidence standard used to determine whether a statutory ground for termination has been met. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts Minors*, 297 Mich App at 40, citing MCL 712A.19b(5). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home[.]" *Id*. at 41-42 (internal citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714. A child's placement with relatives weighs against termination, and the fact that a child is living with relatives is a factor to be considered in determining whether termination is in the child's best interests. *In re Olive/Metts Minors*, 297 Mich App at 43, citing MCL 712A.19a(6)(a) and *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *In re Olive/Metts Minors*, 297 Mich App at 43.

Here, the trial court did not clearly err in finding that termination of parental rights was in the best interests of TB and LB. Respondents' parenting abilities were deficient given their failure to prevent the ongoing sexual abuse despite being provided numerous services over several years. There was evidence that respondents failed to benefit from their case service plan and would not be able to provide adequate supervision to prevent further abuse. TB and LB suffered extensive emotional trauma from the abuse. Further, TB and LB were doing well in their foster home, and their foster parents were willing to provide permanency if no relatives came forward. The trial court did not clearly err in finding that termination was in the best interests of TB and LB.

With respect to GB, however, the trial court failed to explicitly address the fact that GB was placed with a relative, his great-aunt. See MCL 712A.13a(j) (defining "relative" to include a great-aunt). The trial court stated that the children's current placements were in their best interests but did not explicitly address the fact that GB was in the care of a relative. The failure to explicitly address whether termination is appropriate in light of a relative placement renders the factual record inadequate to make a best-interest determination. *In re Olive-Metts Minors*, 297 Mich App at 43. Therefore, we vacate the trial court's best-interest analysis with respect to GB and remand the case to the trial court for further consideration of this issue. *Id*. at 44.

III. EXPERT TESTIMONY

Respondents next argue that the trial court erred in admitting the portion of Neumann's testimony opining that respondents had a very high risk of recidivism concerning the historical neglect and abuse of the children. We conclude that respondents waived this issue. "A party cannot stipulate with regard to a matter and then argue on appeal that the resulting action was erroneous. A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *Hodge v Parks*, 303 Mich App 552, 556; 844 NW2d 189 (2014) (citation and internal quotation marks omitted). A party's affirmative statement that it has no objection to the admission of evidence constitutes a waiver. *People v McDonald*, 293 Mich App 292, 295; 811 NW2d 507 (2011). When petitioner offered Neumann as an expert in the field of sexual risk assessments, respondents' attorneys affirmatively stated that they had "no objection" to his qualification as an expert, despite having previously received his written reports summarizing the same opinions to which he testified at the termination hearing. Respondents' attorneys also affirmatively stated that they had no objection to the admission of Neumann's written report into evidence. By affirmatively stating that they had no objection to Neumann's qualification as an expert and to the admission of his written reports containing the same opinions to which he testified at the termination hearing, respondents have waived the issue concerning whether Neumann was properly qualified as an expert and whether the trial court erred in admitting the portion of his testimony challenged on appeal. *Id*. This waiver eliminated any error, and respondents are precluded from seeking appellate review of this issue. *Hodge*, 303 Mich App at 556. We will nonetheless address the issue because it is relevant to the ineffective assistance of counsel claims discussed later.

Even if this issue were not waived, it would be unpreserved because respondents failed to raise an objection at the termination hearing. MRE 103(a)(1); *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Ordinarily, this Court reviews the admission or exclusion of expert testimony for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76-78; 684 NW2d 296 (2004). To the extent we review this unpreserved issue, our review is for plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id*.

Respondents' argument is implicitly premised on the assumption that the rules of evidence, including MRE 702, the rule concerning expert testimony, applied to the termination hearing. However, MRE 702 and the other rules of evidence were not applicable at the termination hearing in this case. MCR 3.977(H)(2), which addresses termination of parental rights proceedings, provides:

> The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-

> examine individuals who made the report when those individuals are reasonably available.

MCR 3.977(F)(1)(b) requires the grounds for termination to be established by legally admissible evidence where termination is sought on the basis of circumstances that are new or different from the offense that led the court to take jurisdiction. See *In re Jenks*, 281 Mich App 514, 516; 760 NW2d 297 (2008). Here, the supplemental petition sought termination on the basis of the same facts and circumstances that led the court to take jurisdiction and to which respondents pleaded no contest in the adjudicative phase, i.e., respondents' neglect of and failure to supervise the children that resulted in sexual abuse between the children. Thus, the rules of evidence did not apply, and the court could receive and rely on Neumann's written and oral reports to the extent of their probative value. Respondents were afforded an opportunity to cross-examine Neumann at the termination hearing and did so. Therefore, respondents' appellate challenge to the admission of Neumann's testimony premised on the application of MRE 702 is unavailing.

But even if the rules of evidence applied to the termination hearing, respondents have failed to establish that the admission of Neumann's testimony constituted a plain error that affected their substantial rights. MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule "incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). The trial court must act as a gatekeeper to ensure that all expert opinion testimony is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004).

> This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id*. at 782.]

Here, Neumann testified as an expert in sexual risk assessments. Neumann is a therapist with a clinic that provides therapeutic services, evaluations, and treatment, dealing specifically with sexual crimes or acts, incest, rape, and neglect and abuse cases. He has performed this work for 27 years. Neumann has a master's degree in social work and is a licensed clinical

social worker. He has been qualified as an expert multiple times in the area of treatment of juvenile and adult sex offenders. He has evaluated hundreds of adults in his career. Neumann interviewed respondents to obtain their backgrounds and historical issues that led to the petition in this case. He also utilized a number of scales to assist in ruling out issues of predatory and deviant sexual pathology. Neumann was provided with documents, including the petition, the amended petition to which respondents pleaded no contest, the adjudication order, and the initial and updated service plans. Neumann's ultimate conclusion was that respondents were at a low risk for pedophilia or predatory sexual pathology, but that there was a very high risk of recidivism related to the historical neglect of the children that led to the sexual abuse between the children. Neumann did not believe counseling would be successful for respondents given their history of failing to internalize what they were taught in services they were provided and regressing after services ended.

Neumann testified that the portion of his opinion concerning respondents' high risk of recidivism regarding historical abuse and neglect was based on the historical trauma that had taken place and how it had affected the children. The testing tools were not part of the process of determining the high risk of recidivism; rather, the tools were used to assess only respondents' proclivity of sexually acting out with the children, for which there was a low risk. The high risk of recidivism for continued historical neglect was ascertained from the documents he was provided and his conversations with respondents.

On appeal, respondents challenge the portion of Neumann's opinion concerning respondents' high risk of recidivism regarding historical neglect of the children. Respondents contend this aspect of Neumann's opinion fell outside his area of expertise in sexual risk assessments. However, respondents fail to explain exactly why their historical neglect of the children leading to sexual abuse between the children fell outside the area of sexual risk assessments. Neumann testified that he deals with people who commit sex crimes *and* neglect and abuse cases. He has been in this line of work for 27 years. Cottle testified that she asked Neumann to look not only at whether respondents were at risk to sexually abuse their children, but also at whether it would be safe for the children to return home because of concerns about what was being taught to the children and about being exposed to inappropriate sexual behavior. Given the testimony presented, we are not convinced that Neumann's opinion concerning respondents' possible recidivism in neglecting the children fell outside the scope of his expertise in sexual risk assessments.

Respondents further contend that Neumann's opinion concerning recidivism was not based on sufficient facts or data because he did not talk to respondents' counselors, review the counselors' reports, or review respondents' psychological evaluations. As discussed, however, Neumann reviewed other documents concerning this case, including the petition, the amended petition to which respondents pleaded no contest, the adjudication order, and the initial and updated service plans. In addition, Neumann based his opinion on his conversations with respondents and whatever information respondents chose to give him. Respondents offer no principled reason why Neumann's conversations with respondents and the documents he reviewed could not have provided sufficient facts or data to formulate his opinions. Respondents cite no authority to support their contention that Neumann was required to talk to their counselors or review their counselors' reports or respondents' psychological evaluations in order to have sufficient facts or data to express an opinion. "A party cannot simply announce a

position and expect the court to search for authority to sustain or reject that position." *Hodge*, 303 Mich App at 557.

Next, respondents contend that Neumann did not use reliable principles or methods in formulating his opinion concerning the possibility of recidivism for neglect because the tools or scales used to rule out pedophilia were not used for the portion of his opinion concerning neglect. Further, respondents argue, Neumann did not apply principles and methods reliably to the facts of this case because he did not use *any* principles or methods. Again, however, respondents do not cite authority or explain why use of the scales or tools at issue was necessary to render an opinion concerning neglect of the children. This aspect of respondents' argument is not adequately presented on appeal. *Id*. The fact that the tools or scales used to rule out pedophilia were not also used to formulate an opinion regarding recidivism for neglect does not mean that Neumann failed to use reliable principles or methods in reaching his opinion. Moreover, appellate review of respondents' argument is decidedly hampered by their failure to preserve this issue below. Because they failed to challenge the admissibility of Neumann's testimony, and instead acceded to his qualification as an expert and the admission of his written reports, the record is not developed regarding the exact principles or methods that Neumann used to reach his opinion regarding neglect. Given respondents' failure to develop the record and their failure to cite sufficient authority to support their appellate argument, they have failed to establish that Neumann's testimony was not the product of reliable principles and methods.

Respondents further contend that Neumann should not have opined that the children suffered permanent damage because he never spoke to the children's case manager or therapist and because TB's and LB's therapist, Brian Hopkins, could not say that TB and LB suffered permanent damage. However, Neumann explained that he concluded that the children suffered irreparable damage based on the information that respondent mother presented to him, which showed that the sexual abuse in the household had gone on for a number of years and had not been adequately addressed. Respondents fail to develop an argument or cite authority to explain why the information Neumann obtained from respondent mother regarding the sexual abuse that occurred over several years comprised insufficient facts or data to support Neumann's opinion that the children suffered permanent damage. The fact that Hopkins did not express the same opinion fails to establish that Neumann's opinion was based on insufficient facts or data. It goes without saying that experts sometimes reach differing views. It is the trier of fact's role to determine which witnesses it finds credible and what weight to give the various witnesses' testimony. *Freed v Salas*, 286 Mich App 300, 325; 780 NW2d 844 (2009). Moreover, there was ample testimony regarding the extensive emotional harm that the children suffered as a result of the sexual abuse. Respondents have failed to establish that Neumann's testimony on this point should have been excluded.

Finally, even if the trial court erred in admitting the portion of Neumann's testimony challenged on appeal, the error did not affect the outcome of the proceedings. *Duray Dev, LLC*, 288 Mich App at 150. Neumann's written reports expressed the same conclusions as his testimony, and those reports were admitted as exhibits; respondents on appeal do not challenge the admission of the written reports. Further, other witnesses, including the foster care worker and DHS service providers, testified in accordance with Neumann's view that respondents had not internalized the requisite parenting skills despite years of services and that respondents historically regressed after services were removed, making it unsafe to return the children to

respondents. In short, Neumann's testimony was largely duplicative of other witnesses' testimony concerning respondents' ongoing neglect that led to the sexual abuse between the children and respondents' failure to benefit from extensive services provided over several years. Respondents have not established that any error in admitting Neumann's testimony was outcome-determinative.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Respondents next argue that they were denied the effective assistance of counsel. We disagree. Whether respondents were denied the effective assistance of counsel presents a question of constitutional law that we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Respondents failed to preserve this issue by moving for a new termination hearing or an evidentiary hearing on the issue of ineffective trial counsel. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Therefore, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

"In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). To prevail on an ineffective assistance claim, a respondent must show that trial counsel's performance fell below an objective standard of reasonableness and that counsel's performance was so prejudicial that but for the unprofessional errors, a reasonable probability exists that the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel is afforded wide discretion in matters of strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "We will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence." *Id*. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the [respondent] of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation marks omitted). A defense is substantial if it might have made a difference in the outcome. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). A respondent claiming ineffective assistance bears the burden of establishing the factual predicate for the claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Respondents first contend they were denied the effective assistance of counsel when their attorneys failed to object to Neumann's expert testimony. As discussed, however, the trial court did not err in admitting Neumann's testimony. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Moreover, given that part of Neumann's opinion was favorable to respondents, in that he found a low risk of pedophilia or predatory sexual behavior, respondents' attorneys may have made a reasonable strategic choice to allow Neumann's reports and testimony to be admitted. This Court does not second-guess counsel on matters of strategy. *Odom*, 276 Mich App at 415. And as discussed, Neumann's testimony was not outcome-determinative because it was duplicative of his written reports admitted as exhibits and of other witnesses' testimony concerning respondents' ongoing failure to internalize the parenting skills they were taught despite having received numerous services over several years. Thus, even if counsel performed deficiently in failing to object to Neumann's testimony,

respondents have not established a reasonable probability that the outcome of the termination hearing would have been different but for the unprofessional errors. Respondents have failed to establish ineffective assistance of counsel on this ground.

Respondents next contend that their attorneys were ineffective for failing to call as a witness Dr. Harold Sommerschield, who performed the psychological evaluations of respondents. Respondents maintain that Dr. Sommerschield provided an explanation for the cause of their problems and how to correct them, and that his testimony was crucial to show that respondents had the ability to make changes and had done so. However, Dr. Sommerschield's evaluation of respondents occurred on September 19, 2012, nearly 16 months before the termination hearing. Although Dr. Sommerschield's written evaluations indicated that respondents had the ability to provide proper parenting if motivated to do so and with the help of psychological counseling, there is no indication that Dr. Sommerschield had recently reviewed the case or formulated an opinion regarding whether respondents benefited from the therapy and other services provided in the 16 months since the psychological evaluations occurred. It is therefore conjectural to suggest that Dr. Sommerschield's testimony would have been favorable to respondents. Because the record affords no basis to conclude that calling Dr. Sommerschield as a witness might have made a difference in the outcome, the failure to call him did not deprive respondents of a substantial defense. *Payne*, 285 Mich App at 190; *Chapo*, 283 Mich App at 371. Respondents have thus failed to establish ineffective assistance of counsel on this ground.

Next, respondents contend that their attorneys were ineffective for failing to address the results of the psychological evaluations on the record with Cottle, the foster care worker. According to respondents, Cottle made little mention of the results of the psychological evaluations when giving her quarterly updates in this case, and a different result was probable if the trial court had been made aware that respondents' problems were caused by a lack of therapy and a possible need for medication.

However, Cottle did address at the March 12, 2013 statutory review hearing that the psychological evaluations recommended that psychotropic medications be considered for respondent mother, and Cottle noted that respondent father was on psychotropic medication but that he failed to tell DHS of his difficulty in obtaining a prescription for a new medication after an insurance issue made him ineligible for the prior medication he was on. At the same hearing, Cottle testified that respondent mother's psychological evaluation stated that her mental health diagnosis could lead to lack of motivation and fatigue, resulting in inadequate supervision of the children. Further, at the June 11, 2013 hearing, upon questioning by respondent father's counsel, Cottle noted that the psychological evaluation for respondent father recommended possible psychotropic medication for attention deficit hyperactivity disorder (ADHD). At the same hearing, Cottle again stated that respondents completed their psychological evaluations with Dr. Sommerschield and were following his recommendations to participate in therapy. Again at the September 11, 2013 review hearing, Cottle testified that respondent father had completed the psychological evaluation and that the evaluation found he had the ability to parent if motivated. At the same hearing, Cottle noted that respondent mother completed her psychological evaluation that also found she had the ability to parent. At the termination hearing, Cottle again acknowledged on cross-examination by respondent father's attorney that Dr. Sommerschield's psychological evaluation indicated that respondent father had the ability to provide proper parenting. On direct examination by her attorney at the termination hearing, respondent mother

indicated that she had completed the psychological evaluation with Dr. Sommerschield and that she complied with his recommendations to continue with her medications and therapy. Likewise, respondent father testified at the termination hearing on direct examination by his attorney that he completed the psychological evaluation and followed the recommendation to undergo counseling.

In short, contrary to respondents' arguments, the record reflects that Cottle addressed the results of the psychological evaluations at multiple points throughout these proceedings, and the trial court was repeatedly made aware of the results of the psychological evaluations. Respondents have failed to explain how further questioning of Cottle regarding the psychological evaluations would have made a different result reasonably probable. Therefore, this aspect of respondents' ineffective assistance of counsel claim is unavailing.

Next, respondent father asserts that his attorney was ineffective for failing to call his therapist, Jolly, as a witness. Respondent father argues that Jolly was uniquely situated to opine whether respondent father was benefitting from services. But respondent father fails to identify precisely what he thinks Jolly would have concluded on this point. In addition, Cottle testified that Jolly's most recent report indicated that respondent father was only *beginning* to understand some of his responsibilities as a father, such as providing emotional support and keeping the children safe. It is speculative to suggest that Jolly's testimony would have been favorable to respondent father, let alone that it might have made a difference in the outcome. Therefore, the failure to call her as a witness did not constitute ineffective assistance of counsel. *Payne*, 285 Mich App at 190; *Chapo*, 283 Mich App at 371.

V. REUNIFICATION EFFORTS

Respondents' final argument on appeal is that the trial court did not make reasonable efforts to reunify the children with respondents. We disagree. This Court reviews for clear error whether a trial court made reasonable efforts to reunify a child with his or her parents. *In re Mason*, 486 Mich at 152, 166. The interpretation and application of statutes and court rules is reviewed de novo. *In re Laster*, 303 Mich App 485, 487; 845 NW2d 540 (2013).

The trial court must make reasonable efforts to reunify a child with his or her family unless aggravating circumstances exist. MCL 712A.19a(2). The purpose of a case service plan is to facilitate return of the child to his or her home. *In re Mason*, 486 Mich at 156. Also, although "the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App at 248. A respondent must participate in *and* benefit from a service plan. *In re White*, 303 Mich App at 710.

Here, reasonable efforts to reunify respondents with the children were made. A service plan was implemented. Among the services provided were community mental health services, therapy services, psychiatric services, educational services, parenting aides, assistance with budgeting, assistance developing a safety plan, and, initially, supervised parenting time.

Respondents do not dispute that they were provided with these services but contend that the suspension of parenting time amounted to a failure to make reasonable efforts at

reunification. However, parenting time was suspended because the children alleged that respondents sexually abused them. Although criminal charges ultimately were not filed and the allegations were not substantiated, this does not mean that it was unreasonable to suspend parenting time while the allegations were investigated. Moreover, TB began expressing fears about seeing respondents. Cottle indicated that the children's therapists agreed that parenting time should not be reinstated given the numerous allegations and TB's fear. Respondents note that the sexual risk assessments showed they were at a low risk for pedophilia or predatory behavior, but the same assessments also showed a very high risk of recidivism for the historical neglect that led to the sexual abuse between the children, and that respondents did not internalize the therapy that had been provided to them. Following the sexual risk assessments, the court decided to order the filing of a supplemental petition to terminate parental rights and declined to reinstate parenting time. The suspension of parenting time did not amount to a failure to make reasonable efforts at reunification.

Respondents suggest that a psychological evaluation of the children was required when parenting time was suspended. As petitioner notes, respondents mistakenly cite an inapplicable provision, MCL 712A.13a(11), and it appears respondents meant to cite MCL 712A.13a(13), which provides:

> If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.

Respondents suggest that a psychological evaluation was required under this provision, even though the children were already undergoing counseling.

However, MCL 712a.13a(13) governs parenting time for the period from the preliminary hearing to adjudication. *In re Laster*, 303 Mich App at 488. It does not apply after adjudication occurs. *Id*. "The only statutory provisions that concern parenting time between adjudication and the filing of a termination petition are MCL 712A.18f(3)(e) and (f), which only address the required contents of an agency's case service plan that is created following adjudication for use at the initial dispositional hearing." *In re Laster*, 303 Mich App at 489. Those statutory provisions only govern the DHS and what parenting time recommendations the service plan must include after adjudication. *Id*. at 490. Those provisions "do not govern the trial court's authority to enter orders regarding parenting time following adjudication." *Id*. "[T]here is no court rule or statutory provision that governs the trial court's authority concerning parenting time between adjudication and the filing of a termination petition[.]" *Id*. at 491.

> In the absence of a court rule or statute, the issue of the amount, if any, and conditions of parenting time following adjudication and before the filing of a petition to terminate parental rights is left to the sound discretion of the trial court and is to be decided in the best interests of the child. [*Id*. at 490.]

Moreover, once a termination petition is filed, the suspension of parenting time requires no finding of harm and is presumed to be in the child's best interests. *Id*. at 489. See also MCL 712A.19b(4) ("If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition."). Therefore, respondents' reliance on MCL 712A.13a(13) is misplaced as it does not govern the period between the adjudication and the filing of the termination petition, or the period after the filing of the termination petition, which were the time periods during which parenting time was suspended in this case.

Finally, in a somewhat confusing argument, respondents contend that Cottle failed to make reasonable efforts at reunification because she did not "recognize" the findings and recommendations contained in the psychological evaluation of respondent father, including that he was capable of parenting, and instead looked for reasons to say respondent father was not benefitting from services. As discussed, the record reflects that Cottle in fact recognized and addressed in court the results of respondent father's psychological evaluation, and there was no clear error in finding that respondents failed to benefit from the services provided to them. Therefore, respondents' assertion that reasonable efforts were not made is devoid of merit.

Affirmed with respect to the minor children TB and LB. Affirmed in part, vacated in part, and remanded for further consideration of the best-interest issue with respect to the minor child GB. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher